Choy Heng Min @ Chua Hing Ming v Cheah Kah Seng & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMON NO 24NCC-14–11 OF 2013
VERNON ONG J
12 JUNE 2015

Companies and Corporations — Petition — Petition under s 181 — Allegations of oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct on the part of the defendants — Whether proven — Whether appropriate to order buy-out of company shares by either plaintiff or defendants — Whether winding up would be appropriate

The plaintiff and the first and second defendants started a company known as Marvelous Realty Sdn Bhd ('the company') for the purpose of acquiring two pieces of contiguous lands ('Lot 3569 and Lot 3571') in Penang ('the lands') for profit. The parties also entered into a joint venture agreement (the JVA) with one Chin Wai Fong ('Chin') and his wife so as to obtain funding for the purchase of the lands. Chin and his wife then caused to be issued 30% shares in their company, Desaria Land Sdn Bhd ('Desaria'), to the company for the purposes of the joint venture. At the material time, the Board of Directors of Desaria comprised of Chin, his wife, the plaintiff and the first defendant. It was the plaintiff's case that the defendants had thereafter attempted to remove him as the nominated director of Desaria, attempted to dilute his shareholding and also remove him as a director of the company with the intention of excluding him altogether from the management of the company. Consequently, the plaintiff filed the present application for relief under s 181 of the Companies Act 1965 ('the Act'). This application was predicated upon the grounds that the first and second defendants were conducting the affairs of the company in a manner that was oppressive or in disregard to the plaintiff's interest as a member of the company. It was the plaintiff's contention that two extraordinary general meetings (the first and second EGMs) were requisitioned and convened in bad faith with the motive to unfairly prejudice the plaintiff's rights and interests as a shareholder in the company and his legitimate interest in the JVA and the lands as a whole. The defendants argued that the complaint did not fall within the purview of s 181 of the Act and that they had acted only to protect the company's interests namely the company's 30% shareholding in Desaria, and by extension, the lands. As such, the defendants contended that there was nothing commercially unfair about their conduct which attracted the operation of s 181 of the Act. The defendants submitted that they had wanted to remove the plaintiff as a director of the company when they discovered that instead of protecting the interests of the company, the plaintiff chose to act in accordance with the wishes and directions of Chin. The defendants thus

submitted that on the facts of the case, the plaintiff had failed to establish oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct on the part of the defendants.

Held, ordering the company to be wound up:

(1) Under s 181 of the Act statutory protection is afforded to a member of a company against four types of misconduct perpetrated against him, namely (a) oppression; (b) disregard of interests; (c) unfair discrimination; and (d) prejudice. In the present case, the plaintiff's complaints were premised on all four types of misconduct. Although the versions of the plaintiff and the defendants as contained in their affidavits were diametrically opposed to each other, there were a set of facts that were uncontroverted, namely that the parties had come together with the common intention and objective to acquire the land for profit and that what started out as a simple scheme to acquire the lands for profit developed into a convoluted arrangement involving four other companies. It was also clear that the defendants of the one part and the plaintiff, Chin and his wife of the other part were now at odds with each other. In short, the plaintiff and the defendants no longer shared a common intention and objective and could no longer work together. Hence the concerted attempts by the defendants to remove the plaintiff as the nominated director to Desaria coupled with the attempt to dilute his shareholding and to remove him as a director of the company (see paras 38–39 & 41–46).

(2) On the totality of the evidence as disclosed in the affidavits, the court was satisfied that there was a visible departure from the standards of fair dealing. The plaintiff's complaints had been made out. The affairs of the company were being conducted in a manner oppressive to the plaintiff and in disregard of the plaintiff's interests as a member of the company (see para 47).

(3) It was clear that the original intention of the parties had been overtaken by events and there was no longer a meeting of the minds. The joint venture between the plaintiff and the defendants was at an end. However, in view of the fact the company was not the registered proprietor of the lands and taking into consideration the circumstances of the case it would not be appropriate to order a buy-out of the shares by either the plaintiff or the defendants as any share valuation exercise of the shares of the company would be fraught with difficulties. As such, the only appropriate order to be made in the circumstances was for the company to be wound up (see paras 48–50).

[Bahasa Malaysia summary

Plaintif dan defendan kedua dan ketiga telah menubuhkan syarikat yang dikenali sebagai Marvelous Realty Sdn Bhd ('Syarikat') bagi tujuan mendapatkan dua bidang tanah yang bersebelahan ('Lot 3569 dan 3571') di Pulau Pinang ('tanah tersebut') bagi mendapatkan keuntungan. Pihak-pihak memasuki satu perjanjian usaha sama ('PUS') dengan seorang yang bernama Chin Wai Fong ('Chin') dan isterinya untuk mendapat pembiayaan belian tanah tersebut. Chin dan isterinya mengeluarkan saham 30% dalam syarikat mereka, Desaria Land Sdn Bhd ('Desaria'), kepada syarikat bagi tujuan usaha sama. Pada masa material, Lembaga Pengarah Desaria yang terdiri daripada Chin, isterinya, plaintif dan defendan pertama. Menurut plaintif, selepas itu defendan-defendan cuba menyingkirkannya sebagai pengarah yang dicalonkan, cuba melemahkan pegangan saham dan juga menyingkirkannya sebagai pengarah syarikat dengan niat memulaukannya terus daripada pengurusan syarikat. Akibatnya, plantif memfailkan tindakan bagi relief di bawah s 181 Akta Syarikat 1965 ('Akta'). Permohonan ini berdasarkan alasan bahawa defendan pertama dan kedua menguruskan syarikat dalam cara yang menindas atau mengabaikan kepentingan plaintif sebagai ahli syarikat. Plaintif menghujahkan bahawa dua mesyuarat am luar biasa (EGM pertama dan kedua) direkuisisi dan diadakan secara niat jahat dengan motif untuk memprejudiskan hak dan kepentingan plaintif sebagai pemegang saham syarikat dan kepentingan sahnya dalam PUS dan tanah secara keseluruhan. Defendan-defendan menghujahkan bahawa aduan tersebut tidak terjumlah di bawah rangkuman s 181 Akta dan bahawa mereka bertindak untuk melindungi kepentingan syarikat khususnya pegangan saham 30% syarikat dalam Desaria, dan dengan lanjutan, tanah tersebut. Dengan itu, defendan menghujahkan bahawa tiada apa-apa yang tidak adil secara komersil mengenai tindakan mereka yang menarik operasi s 181 Akta. Defendandefendan menghujahkan bahawa mereka ingin menyingkirkan plaintif sebagai pengarah syarikat apabila mendapat tahu bahawa plaintif yang sepatutnya melindungi kepentingan syarikat sebaliknya memilih untuk bertindak selaras dengan hasrat dan arahan Chin. Defendan-defendan dengan itu menghujahkan bahawa berdasarkan fakta kes, plaintif gagal membuktikan tindakan menindas, mengabaikan kepentingan, diskriminasi tidak adil atau prejudis oleh defendan-defendan.

Diputuskan, mengarahkan agar syarikat digulungkan:

(1) Di bawah s 181 Akta, perlindungan statutori diberi kepada ahli syarikat terhadap empat jenis salah laku terhadapnya, khususnya (a) penindasan; (b) pengabaian kepentingan; (c) diskriminasi tidak adil; dan (d) prejudis. Dalam kes ini, aduan plaintif berkisarkan semua empat jenis salah laku. Walaupun versi plaintif dan defendan-defendan, seperti yang terkandung dalam afidavit mereka menentang satu sama lain, wujud satu set fakta yang tidak dipertikaikan, khususnya bahawa pihak-pihak

bersatu dengan niat dan objektif bersama untuk memperoleh tanah bagi mendapat keuntungan dan apa yang bermula dengan satu skima yang mudah untuk memperoleh tanah bagi keuntungan berkembang menjadi perancangan yang berjela-jela melibatkan empat syarikat lain. Jelas bahawa defendan-defendan di satu pihak dan plaintif, Chin dan isterinya di pihak lain kini menentang satu sama lain. Pendek kata, plaintif dan defendan tidak lagi berkongsi niat dan objektif bersama dan tidak lagi boleh bekerjasama. Oleh itu, defendan-defendan berusaha menyingkirkan plaintif sebagai pengarah yang dicalonkan untuk Desaria ditambah pula dengan usaha untuk melemahkan pegangan saham dan untuk menyingkirkannya sebagai pengarah syarikat itu (lihat perenggan 38–39 & 41–46).

(2) Berdasarkan keseluruhan keterangan seperti yang dinyatakan dalam afidavit, mahkamah berpuas hati bahawa berlaku satu penyimpangan daripada piawaian urusan wajar. Aduan plaintif telah disediakan. Hal ehwal syarikat dijalankan dengan cara yang menindas plaintif dan mengetepikan kepentingan plaintif sebagai ahli syarikat (lihat perenggan 47).

(3) Jelas bahawa tujuan asal pihak-pihak diatasi oleh peristiwa-perisitiwa yang berlaku dan tidak ada lagi pertemuan minda. Usaha sama antara plaintif dan defendan telah berakhir. Walau bagaimanapun, memandangkan syarikat bukan lagi tuan punya berdaftar tanah dan mengambil kira hal keadaan kes, tidak akan menjadi sesuai lagi untuk memerintahkan pembelian saham oleh plaintif atau defendan kerana mana-mana bahagian langkah penilaian saham syarikat akan sarat dengan kesukaran. Oleh itu, satu-satunya perintah yang sepatutnya dibuat dalam hal keadaan itu adalah agar syarikat digulung (lihat perenggan 48–50).]

Notes

For cases on petition in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 775–776.

Cases referred to

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)

Legislation referred to

Companies Act 1965 ss 181, 181(2)(e), Form 49

James Khong (James Khong) for the plaintiff.
Frida Krishnan and Veronica Dominic (Chin & Rakan-Rakan) for the defendants.

Vernon Ong J:

INTRODUCTION

[1] The plaintiff's application for relief is made under s 181 of the Companies Act 1965 ('CA 1965'). It is predicated upon the grounds that the first and second defendants who are shareholders and directors of the third defendant company ('the company') are conducting the affairs of the company in a manner that is oppressive or in disregard to the plaintiff's interest as a member of the company.

[2] After hearing of submission of counsel for the parties and reading the written submissions and the affidavits, the court granted the declarations sought and, inter alia, ordered that the company be wound up pursuant to s 181(2)(e) of the CA 1965. For convenience, the word 'defendants' appearing hereinafter shall refer to the first and second defendants jointly.

BRIEF ACCOUNT OF THE SALIENT FACTS

[3] The company was acquired by the parties as the vehicle for the purposes of acquiring two pieces of contiguous lands (Lot 3569 and Lot 3571) in Penang ('the lands'). The plaintiff and the defendants are the only shareholders and directors of the company.

[4] The company has an authorised share capital of RM100,000 divided into 100,000 ordinary shares of RM1 each; of which 1,000 ordinary shares have been issued and fully paid-up or credited as fully paid up, as follows:

Plaintiff	...	400 shares (40%)
First Defendant	...	400 shares (40%)
Second Defendant	...	200 shares (20%)

[5] Prior to the acquisition of the company, the defendants identified the lands for purposes of investment and/or development. The plaintiff approached one Mr Chin Wai Fong ('Chin') who agreed to provide the funding to purchase the lands.

[6] It was agreed that the plaintiff and the defendants would purchase the company for the purposes of entering into a joint venture with Chin and his wife Loke Lee Luan ('Loke') to purchase and hold the lands.

[7] Chin and Loke then caused to be issued 30% shares in their company Desaria Land Sdn Bhd ('Desaria') to the company for the purposes of the joint

venture. Desaria's shareholding structure is as follows:

Chin Loke	and	... 70%
the company		... 30%

[8] The joint venture culminated in a joint venture agreement dated 28 November 2007 ('the JVA') between Chin and Loke of the one part and the company of the other part.

[9] The first defendant and the plaintiff were nominated as the company's directors on the board of Desaria. At the material time, the Board of Directors of Desaria comprised of Chin, Loke, the plaintiff and the first defendant.

[10] As the undivided [be] share of Lot 3569 and Lot 3571 was subject to a public auction, the plaintiff, defendants, Chin and Loke decided to acquire the said properties by bidding for it in the public auction. For this purpose, Desaria purchased a shelf company known as Evergreen Haven Sdn Bhd ('Evergreen') to purchase the undivided [be] share of Lot 3569 and Lot 3571 at the public auction.

[11] Desaria appointed two directors and shareholders of equal shareholding to hold the entire shareholding of Evergreen on trust for Desaria. The nominee directors cum shareholders holding one share each are Tang Ah Bee and Chan Jit Hoong. A trust deed dated 5 October 2009 was created pursuant to the aforesaid arrangements.

[12] Evergreen proceeded to bid for the undivided [be] share of Lot 3569 and Lot 3571 and purchased the same by obtaining a loan from Setarabakat Sdn Bhd ('Setarabakat'). Setarabakat is wholly owned by Chin and Loke.

[13] As for the remaining undivided [bc] share of Lot 3569, Desaria purchased another shelf company named Goldhill Glory Sdn Bhd ('Goldhill') to purchase it from the owner Voon Foo Feng.

[14] Desaria appointed two directors and shareholders of equal shareholding to hold the entire shareholding of Goldhill on trust for Desaria. The nominee directors cum shareholders holding one share each are Alan Chin Chia Loon (nominee of Chin and Loke) and Wong Ong Chit (the company's nominee).

[15] Ultimately, the sole interest of the four companies, namely, Evergreen, Goldhill, Desaria and the company are the lands.

A EVENTS LEADING TO THE DISPUTE

[16] Some time in 2010, Chin expressed his desire to have the lands held by Evergreen transferred to Desaria to reflect the 70%:30% stake of the lands in the JVA. This was opposed by the defendants. Subsequently, negotiations took B place between the defendants, Chin and the plaintiff. The defendants wanted to have the lands sold and the proceeds to be held by Evergreen; Chin was opposed to this suggestion.

C **[17]** On 24 September 2013, Setarabakat issued a s 218 notice ('the s 218 notice') pursuant to the CA 1965 to Evergreen, demanding the sum of RM884,654.54 being the interest due and owing by Evergreen to Setarabakat under the loan agreement.

D *(The first event)*

[18] Pursuant to a meeting of the board of directors of the company on 24 October 2013 ('the board meeting'), a resolution was passed whereby (a) the plaintiff was removed as the company's nominated director in Desaria; (b) the E plaintiff was replaced by the second defendant as the company's representative in Desaria; and (c) the P was to resign immediately as the company's nominated director in Desaria.

[19] It is not disputed that the plaintiff was not present at the board meeting F as he had apparently departed from Kuala Lumpur to Bangkok en route to Bhutan on 24 October 2013. The plaintiff returned to Kuala Lumpur on 3 November 2013.

[20] The plaintiff asserts that prior to leaving for Bhutan, the second G defendant and the company secretary informed him that a board of directors meeting of the company would be called to discuss the s 218 notice. He did not receive any notice of the board meeting and nothing was said about his impending removal as the company's nominated director in Desaria. He informed the second defendant and the company secretary of his Bhutan trip H and asked for the board meeting to be postponed until after his return on 3 November 2013.

[21] Immediately on being informed of the resolutions vide the company's letter dated 25 October 2013 which was faxed to his office, the plaintiff I instructed solicitors to issue a letter dated 4 November 2013 stating, inter alia, that as he had no prior notice the board meeting is invalid and that any resolutions passed are null and void.

(The second event)

[22] On 24 October 2013, the defendants procured a notice to be issued by the company to Desaria pertaining to the plaintiff's removal as the company's nominated director in Desaria.

[23] On 28 October 2013, a notice of extraordinary general meeting ('the first EGM') was issued by the company to pass resolutions to increase the share capital of the company and for a rights issue.

[24] On 4 November 2013, another notice of extraordinary general meeting ('the second EGM') was issued by the company to remove the plaintiff as a director of the company.

[25] Meanwhile, on 4 November 2013, the plaintiff attended a Board of Directors Meeting of Desaria. The plaintiff discovered that the defendants had caused the company to issue to Desaria a special notice and requisition dated 4 November 2013 to convene an extraordinary general meeting to pass resolutions for the removal of the plaintiff as a director of Desaria and for the second defendant to be appointed as a director of Desaria.

[26] The first EGM was convened on 25 November 2013. However, the special resolution for the increase in the share capital was not carried and the ordinary resolution for a rights issue became redundant.

[27] It is the plaintiff's contention that both the first and second EGM's were requisitioned, convened in bad faith with the motive to unfairly prejudice the plaintiff's rights and interests as a shareholder in the company and his legitimate interest in the JVA and the lands as a whole.

[28] On 25 November 2013, the same day the first EGM was convened, the defendants caused the company to issue another notice for an extraordinary general meeting ('the third EGM'); whereby the increase in share capital is by way of ordinary resolution followed by another ordinary resolution for a rights issue.

[29] The third EGM notice was fixed for 10.30am on 9 December 2013 to be held immediately after the second EGM to remove the plaintiff as the company's director which was scheduled for 10am the same day.

THE PLAINTIFF'S CASE

[30] In essence, the plaintiff's argument is that the aforesaid first and second events are oppressive and unfairly prejudicial to the plaintiff's rights and interests as a shareholder of the company; and that the singular objective of the defendants was to:

(a) remove the plaintiff as the nominated director of the company to Desaria when he was away;

(b) dilute his shares in the Co; and

(c) remove him as a director of the company.

THE DEFENDANTS' REPLY

[31] On the first issue, learned counsel for the defendants argued that the complaint does not fall within the purview of s 181 of the CA 1965. The complaint is about his removal as the company's nominated director in Desaria and not as a director of the company. It is not a complaint which affects the plaintiff's rights as a member of the company.

[32] At any rate, due notice of the board meeting was given to the plaintiff by AR registered mail on 16 October 2013 to the plaintiff's address as per Form 49 as well as the annual returns. Pursuant to art 108, the notice of meeting is deemed to be effected on the day after its posting. In addition, the first defendant telephoned the plaintiff and informed him of the board meeting and the agenda on 24 October 2013. Further, on 19 October 2013 and 21 October 2013, the first defendant reminded the plaintiff personally of the same. The defendants contend that the plaintiff deliberately and intentionally wanted to avoid the board meeting.

[33] In regard to the second issue, the defendants denied that they wanted more control over the company or that their conduct was oppressive and unfairly prejudicial to the plaintiff. The defendants contend that they were only protecting the company's interest in Desaria and its subsidiaries at all material times. At all material times, the company owns 30% of Desaria, which is also the beneficial owner of the shares:

(a) in Evergreen which owns part of Lot 3569 and Lot 3571 being its sole asset; and

(b) Goldhill which owns the remaining part of Lot 3569, being its sole asset.

[34] The defendants also contend that Chin and his wife Loke wanted personal and total control of the lands and wanted the lands to be transferred to him and Loke, to the detriment and prejudice of the interest of the company and the defendants. The defendants brought this matter to the plaintiff's attention. Instead of protecting the interests of the company, the plaintiff chose to act in accordance with the wishes and directions of Chin. Since Chin did not get his way, he caused Setarabakat to issue a s 218 notice to demand payment of RM884,654.54 being the purported interest for the loan granted by Setarabakat to Evergreen for the purchase of the Evergreen lands.

[35] As such, the company needed to defend itself by the third AGM to increase the share capital of the company and to authorise a rights issue of 299,000 shares.

[36] The defendants contend that for the aforesaid reasons, the defendants wanted to remove the plaintiff as a director of the company.

[37] Learned counsel for the defendants argued that on the facts of the case, the plaintiff has failed to establish oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct on the part of the defendants. Whatever decision taken by the defendants was to protect the interest of the company, namely the 30% shareholding in Desaria, and by extension, the lands, which is a commercial decision. As such, there was nothing commercially unfair about the conduct of the defendants which attracts the operation of s 181 of the CA 1965.

SECTION 181(1) OF THE CA – 1965 – AN OVERVIEW OF THE LAW

[38] Section 181 of the CA 1965 provides statutory protection to members against majority members or members who do not have a controlling interest in the company (*Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789).

[39] Briefly, the protection is afforded against four types of misconduct perpetrated against a member of a company: (a) oppression; (b) disregard of interests; (c) unfair discrimination; and (d) prejudice. These four types of conduct may overlap; at the same time, each type may stand on its own. It is a question of fact differing from case to case.

[40] The test for determining whether the conduct complained of falls within the meaning of s 181 is an objective test. In other words, the evidence must be scrutinised objectively and as the Federal Court put it in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at p 129, 'must eminently be determined according to the facts of each particular case'.

DECISION OF THE COURT

[41] In the present case, the plaintiff's complaints are premised on all four types of misconduct.

[42] The versions of the plaintiff and the defendants as contained in their affidavits are diametrically opposed to each other. Be that as it may, there are a set of facts which are uncontroverted.

[43] The parties came together with the common intention and objective to acquire the land for profit. The company started as a joint venture between the parties; this arrangement is reflected in the shareholding structure and the constitution of the board of directors. The fact that the plaintiff was also company's nominated director in Desaria reinforced the plaintiff's role in the scheme of things.

[44] What started out as a simple scheme to acquire the land for profit developed into a convoluted arrangement involving four other companies – Desaria, Evergreen, Goldhill and Setarabakat.

[45] It is clear that the defendants of the one part and the plaintiff, Chin and Loke of the other part are now at odds with each other. In short, the plaintiff and the defendants no longer share a common intention and objective. They can no longer work together.

[46] Consequently, there were concerted attempts by the defendants to remove the plaintiff as the nominated director to Desaria coupled with the attempt to dilute his shareholding and to remove him as a director of the company.

[47] The court agrees with the argument of learned counsel for the plaintiff that the attempts were carried out for a collateral purpose to exclude the plaintiff altogether from the management of the company in furtherance of their scheme to gain more control of Evergreen. On the totality of the evidence as disclosed in the affidavits, the court is satisfied that there was a visible departure from the standards of fair dealing. The plaintiff's complaints have been made out. The affairs of the company are being conducted in a manner oppressive to the plaintiff and in disregard of the plaintiff's interests as a member of the company.

[48] The original intention of the parties has been overtaken by events; there is no longer a meeting of the minds. The joint venture between the plaintiff and the defendants is at an end.

[49] In all the circumstances, it would not be appropriate to order a buy-out of the shares by either the plaintiff or the defendants. In the circumstances of this case, the valuation of the shares of the company would be fraught with difficulties. The company is not the registered proprietor of the lands. It only owns 30% of the shareholding of Desaria which is also the beneficial owner of the shares in Evergreen and Goldhill. It is not likely that Chin, Loke and the trustees of the shares will give their co-operation in a share valuation exercise; at any rate, there is no indication that their co-operation is forthcoming. To complicate the situation even further, there are pending legal proceedings

instituted by Setarabakat against Evergreen.

[50] For the foregoing reasons, the only appropriate order to be made in the circumstances is for the company to be wound up. And it was so ordered.

Company ordered to be wound up.

Reported by Kohila Nesan